Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ALEXANDRIA HISTORICAL RESTORATION AND PRESERVATION COMMISSION, *ET AL.*,

Petitioners,

v.

FEDERAL HIGHWAY ADMINISTRATION, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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June 5, 2000

80 pp

QUESTION PRESENTED

In preparing the Environmental Impact Statement required by the National Environmental Policy Act ("NEPA") for a multi-billion dollar highway and bridge project through a landmark historic district, the Department of Transportation analyzed only alternatives with twelve lanes, disregarding ten-lane alternatives that would accomplish the principal aims of the agency, but would accommodate marginally less traffic than that projected for peak hours during the year 2020.

The question presented is:

Whether the court of appeals erred in holding, contrary to other circuit courts, that a federal agency may narrow the range of alternatives for a project that is analyzed under NEPA by excluding from consideration an alternative that does not fully satisfy a narrowly defined non-environmental objective, but that would substantially achieve the general goals of the project with less adverse environmental impact.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are the Alexandria Historical Restoration and Preservation Commission, the Historic Alexandria Foundation, and the Coalition for a Sensible Bridge, Inc. The Coalition for a Sensible Bridge, Inc., is a not-for-profit corporation that has no parent corporation or publicly held securities.

The respondents in this case are the Federal Highway Administration, Kenneth Wykle, Administrator of the Federal Highway Administration, and Rodney E. Slater, Secretary of Transportation.

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Michael E. Lackey, Jr., *Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants*, 60 GEO. WASH. L. REV. 1232 (1992) 13, 15

OPINIONS BELOW

The opinion of the court of appeals, Appendix ("App.") 1a-24a, is reported at 198 F.3d 862. The orders of the court of appeals denying rehearing and rehearing en banc, App. 25a-26a, are unreported. The opinion of the district court, App. 27a-53a, is reported at 46 F. Supp. 2d 35.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1999. App. 1a. A petition for rehearing was denied on March 7, 2000. App. 25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Provisions of the National Environmental Policy Act and the regulations implementing the Act are reproduced, in relevant part, at App. 54a-56a.

STATEMENT OF THE CASE

The Woodrow Wilson Memorial Bridge provides the southern Potomac River crossing for the Capital Beltway. The Bridge and Beltway pass through Alexandria, Virginia, a densely populated and historically significant city whose eastern border is the Potomac River.

The Bridge, built in 1961, currently has six lanes, creating a bottleneck on the eight-lane Beltway. App. 2a. In addition, traffic across the Bridge exceeds the capacity for which it was designed. According to 1997 Department of Transportation ("DOT") estimates, usage of the Bridge is expected to be around 275,000 vehicles per day in 2020,

with a maximum of 300,000 vehicles per day. App. 28a, 44a. In November 1997, DOT approved a highway/bridge project that would replace the current six-lane Bridge with two side-by-side, six-lane bridges and would expand four nearby interchanges on the Beltway with new ramps and flyovers to separate traffic into local and through traffic lanes on the bridges and their approaches. App. 28a.

Although the Beltway has only eight lanes, DOT focused from the outset of its planning on replacing the Bridge with a crossing of twelve lanes, including two for high-occupancy vehicles ("HOV"). In 1991, DOT issued a draft Environmental Impact Statement ("EIS"), comparing five "build" proposals for replacing the Bridge. Each of the alternatives in the draft proposed doubling the size of the river crossing from six to twelve lanes, and included a similar expansion along a five-mile corridor of the Beltway on each side of the river. App. 2a-3a, 29a-30a.

As the court of appeals put it, "[r]eaction to the draft was less than enthusiastic; the Administration was criticized for assessing inadequately the environmental and cultural impacts of its proposal, and for failing to coordinate its work with that of interested governmental agencies and community groups." App. 3a. As a result, DOT purportedly "went back to the drawing board." *Id.*

A second draft EIS was published in January 1996. The 1996 draft described six "build" alternatives; once again, all of the alternatives had twelve lanes. The only significant differences among the alternatives were the form (*i.e.* drawbridge, suspension bridge, or tunnel) and location of the river crossing (*i.e.*, at the site of the current Bridge or one-half mile south). App. 31a.

Also in 1996, DOT asked the local Transportation Planning Board to determine whether the anticipated

project would conform to the requirements of the Clean Air Act, which forbids federal approval of projects that would prevent or delay a region's compliance with federal air quality standards. *See* 42 U.S.C. § 7506(c)(1)(B). DOT requested a "conformity analysis" for a new bridge built with space for twelve lanes, but for which only ten lanes would be opened for use until some indefinite future date. The Board determined that a ten-lane bridge would conform, but no conformity analysis was then done for a twelve-lane bridge. App. 31a-32a.

DOT issued its Final EIS in September 1997. The Final EIS gave detailed consideration to eight alternative proposals (seven "build" alternatives and a "no build" alternative), comparing them on a range of criteria including capacity, cost, and environmental impacts. Like both of the prior draft EISs, every "build" alternative scrutinized in the Final EIS had twelve lanes (including HOV lanes), as well as a configuration that separated local and express traffic. The only material difference among the proposed alternatives was the type of river crossing; the "build" alternatives included a range of tunnel and bridge types. App. 4a. Although the Final EIS briefly mentioned eight- and ten-lane options, it did not afford them full treatment as formal "alternatives" because DOT concluded that narrower river crossings would fall short of meeting DOT's projections of the Bridge's traffic needs in 2020. *Id.* No alternative with fewer than twelve lanes was subjected to a detailed environmental impact analysis in the Final EIS.[1]

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[1] The Final EIS states that a ten-lane, no-HOV option was considered "in the early stages of the study ... [but] was dropped at that time ... because it was insufficient from a functional, safety and operational standpoint." App. 32a. That conclusion follows (...continued)

In November 1997, DOT issued its Record of Decision approving the Preferred Alternative identified in the Final EIS: a highway project that calls for replacing the Bridge with two parallel drawbridges, each with space for six lanes (including one lane for HOV traffic). App. 28a. The two six-lane bridges would more than double the width of the existing Bridge and would rise an additional twenty feet above the River. *Id.* The approved project also entails reconstructing a five-mile stretch of the Beltway to accommodate twelve lanes, notwithstanding the eight-lane width of most of the Beltway. In particular, the approved project authorizes substantial redesign and reconstruction of the four interchanges closest to the crossing (two on either side of the River) to separate local and express traffic into the twelve-lane configuration. *Id.*

The City of Alexandria filed suit in early 1998 to challenge the Record of Decision on grounds that it violated the National Environmental Policy Act ("NEPA"), the Clean Air Act, the National Historic Preservation Act, and the Department of Transportation Act. Three interested organizations—the petitioners here—intervened as plaintiffs. After both sides filed motions for summary judgment, the City and DOT reached a settlement agreement, leaving petitioners as the sole plaintiffs. App. 5a.

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primarily, if not exclusively, from the supposedly reduced rush-hour capacity of a ten-lane, no-HOV crossing compared to a twelve-lane crossing with HOV lanes. DOT's own traffic analysis showed, however, that a ten-lane crossing could handle up to 295,000 vehicles per day, or 98 percent of DOT's 1997 estimate of the maximum daily vehicular usage in 2020. App. 44a. (Moreover, DOT later decreased its estimate of maximum usage in 2020 to 295,000 vehicles per day. *See* Final Supplemental EIS, at p. 4-4 (Apr. 14, 2000).)

The district court entered summary judgment for petitioners. App. 27a-53a. The district court ruled that DOT violated NEPA in two respects. First, the court determined that DOT failed to provide a detailed analysis in the EIS for all reasonable alternatives for the project, including specifically a ten-lane river crossing. The court noted that the Final EIS's statement of the purpose and need of the project "hardly provides an unequivocal basis for eliminating ten-lane alternatives from consideration," that a ten-lane structure could accommodate up to 98 percent of the estimated maximum demand in 2020, and that DOT itself had characterized the project as a ten-lane river crossing for Clean Air Act compliance purposes. App. 44a-45a. Second, the court ruled that the Final EIS inadequately discussed the environmental impacts of construction activities, providing a discussion "of such a broad and generic nature that it could apply to practically any construction project undertaken by" DOT. App. 46a. The court also ruled that DOT violated the Clean Air Act by approving construction of a twelve-lane structure after performing a "conformity analysis" for only a ten-lane bridge. App. 38a. Finally, the court ruled that DOT violated Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, by failing to complete the process of identifying all historic sites, parks, and other protected resources that might be affected by all aspects of the project before issuing the Record of Decision. App. 50a.

The court of appeals reversed on all issues other than those concerning the Clean Air Act, which DOT did not appeal. App. 1a-24a. With respect to NEPA's requirement that an EIS must consider all reasonable alternatives, the court held that it was not improper for DOT to exclude any alternative smaller than twelve lanes

from consideration in the Final EIS. According to the court of appeals, DOT defined the project's objective as satisfying expected peak hours traffic demand at the crossing site in 2020, and thus a ten-lane alternative could be excluded because of its inability to satisfy fully DOT's forecasted peak-hour needs in 2020. App. 11a-13a. The court also stated that DOT's decision to analyze only ten-lane structures for Clean Air Act purposes did not undermine this conclusion, because NEPA and Clear Air Act analyses "have different time horizons." App. 14a; *but see* 23 C.F.R. § 450.322(a); 40 C.F.R. § 93.118(b) (requiring Clean Air Act conformity findings to be made for a 20-year horizon).

REASONS FOR GRANTING THE WRIT

This case presents fundamental questions concerning the procedural constraints imposed on federal agencies by the National Environmental Policy Act. The court of appeals' decision conflicts with decisions of other courts of appeals in applying NEPA and undermines the express purposes of the Act by permitting a federal agency to limit the range of alternatives analyzed under NEPA to only those alternatives that fully satisfy an unreasonably narrow definition of the functional purpose of the project at issue.

Aside from exacerbating a circuit court split concerning a vital statute that applies to all "major Federal actions," 42 U.S.C. § 4332(2)(C) (App. 54a), the result reached below is of considerable importance because in this case it would allow DOT to proceed immediately with a currently-estimated $2.5 billion construction project through the National Register "Old and Historic District" of Alexandria, Virginia, including the area commonly known as Old Town. Alexandria is "one of America's most historic cities." App. 29a. It contains an extraordinary collection of historic resources, including a National Register Historic District, a National Historic Landmark District, three individual National Historic Landmarks, and many properties listed or eligible for listing on the National Register of Historic Places. *Id.* Alexandria's historic sites and other environmental resources will be adversely affected by the project approved by DOT, which concededly has not taken a "hard look" at any smaller alternative to the approved project.

I. THE COURT OF APPEALS' RULING CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The D.C. Circuit's restrictive view of the requirements imposed by NEPA, while consistent with that recently embraced by a divided panel of the Eighth Circuit, conflicts with decisions of the Seventh and Eleventh Circuits on the same issues.

NEPA requires federal agencies to take a hard look at environmental issues by preparing a "detailed statement" in an EIS on "the environmental impact" and "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C) (App. 54a). As part of the required analysis, an agency must "[r]igorously explore and objectively evaluate *all reasonable alternatives*" to a proposed project. 40 C.F.R. § 1502.14 (emphasis added) (App. 55a). The discussion of alternative projects is the "heart of the [EIS]." *Id.*

According to the D.C. Circuit, NEPA's requirement that "all reasonable alternatives" be considered calls for an inquiry into "whether an agency's objectives are reasonable, and whether a particular alternative is reasonable in light of these objectives." App. 9a. The decision of the court of appeals in this case makes clear that in defining the objectives for a project, an agency is not "substantively constrain[ed]" by NEPA. App. 10a. This means, among other things, that an agency may exclude all environmental factors from consideration in defining the objective by which the reasonableness of alternatives is considered under NEPA. Thus, an agency is free to define the functional objective of a project—as it did in this case—in a fashion that effectively narrows the range of alternatives that can meet the stated objective to ones that have virtually indistinguishable environmental

impacts. The court of appeals thus held that DOT could exclude from consideration in the EIS an alternative that would not meet the agency's narrowly defined objective. App. 13a.

The Seventh Circuit's decisions establish a different NEPA standard, which requires agencies to undertake a broader analysis in complying with the statute. In *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), that court held that an agency does not enjoy a free hand in defining the objectives of a project for NEPA purposes:

> One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. *Id.* at 666.

See also Van Abbema v. Fornell, 807 F.2d 633, 638 (7th Cir. 1986) ("the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action").[2]

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[2] A similar interpretation of NEPA was recently advanced by Judge Richard Arnold in his dissenting opinion in *City of Bridgeton v. FAA*, __ F.3d __, 2000 WL 355521, at *14 (8th Cir. Apr. 7, 2000) (R. Arnold, J., dissenting) (concluding that a runway alternative was improperly excluded from the EIS on the basis that it did not "provide independent simultaneous IFR arrival capability," which "is only one way of achieving" the project's (...continued)

The Eleventh Circuit also has disagreed with the position taken by the court of appeals in this case that an agency may exclude from its analysis under NEPA any alternative that does not fully satisfy the stated objective, including alternatives that would achieve most of the desired result with considerably less adverse environmental impact. App. 13a. In *North Buckhead Civic Association v. Skinner*, 903 F.2d 1533 (11th Cir. 1990), the Eleventh Circuit agreed with the objectors to a highway project that requiring the agency to consider alternatives that only partly satisfy the project's objectives serves NEPA because "a discussion of alternatives that would only partly meet the goals of the project may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact." *Id.* at 1542; *accord City of Bridgeton*, __ F.3d at __, 2000 WL 355521, at *15 (R. Arnold, J., dissenting). Although the Eleventh Circuit held in *North Buckhead* that the agency did not violate NEPA by failing to consider an alternative that would fall short of satisfying the project's transportation goals, it did so because there was no evidence that the alternative proposed by the objectors would have a less severe environmental impact. 903 F.2d at 1542.[3] According to

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general goal "of achieving increased capacity and reduced delay" at the St. Louis airport). The panel majority in that case did not agree. *Id.* at *6-7 (deeming reasonable the exclusion of a runway alternative from the EIS because it lacked simultaneous IFR arrival capability).

[3] In this case, although DOT refused to perform a detailed analysis of the environmental impacts of any alternative with fewer than twelve lanes, there is substantial evidence in the administrative record that a smaller river crossing would have lesser (...continued)

the court of appeals opinion in this case, however, an agency need *never* consider alternatives that would only "partly meet" the agency's defined goal, no matter how great the environmental benefits of such an alternative might be and no matter how close the alternative comes to *meeting that goal.*

The modes of analysis required by the D.C. Circuit and the other referenced circuits are irreconcilable. For example, *Simmons* involved the Corps of Engineers' approval of the construction of a dam to create a new reservoir in Illinois to supply drinking water both to the City of Marion and to the Lake of Egypt Water District. In preparing its EIS, the Corps considered the project's purpose to be "finding or creating a single source to supply both Marion and the ... Water District." *Id.* at 669. The Seventh Circuit held that this definition was unreasonably narrow in light of the underlying *problem* to be addressed: "The general goal of Marion's application is to supply water to Marion and the Water District—not to build (or find) a single reservoir to supply that water." *Id.* The Corps therefore violated NEPA by excluding from consideration any alternative that could solve the general problem, but that did not satisfy the Corps' narrower objective of creating a single source to supply both markets.

In contrast, the D.C. Circuit in this case refused to step back from DOT's narrow definition of its objective to consider the underlying problems being addressed. As the EIS stated and the district court found, the general goal of the project is to "address[] the future transportation needs

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environmental impacts. *See* App. 43a; *see also, e.g.*, C.A. App., Vol. VIII, p. 91 (Final EIS).

of the region." App. 44a. Moreover, according to the discussion in the Final EIS of the "Purpose of and Need for Action," the needs to be addressed by the project are numerous: removal or rehabilitation of the aging structure that is currently in use; improvement of safety through the addition of roadside "breakdown lanes"; elimination of the bottleneck created when eight lanes of traffic on the Beltway converge into six lanes on the Bridge; lessening the frequency with which the drawbridge must be opened for maritime traffic; accommodating the volume of local, regional, and interstate traffic that is expected to be crossing the River in the vicinity of Alexandria through the year 2020; and protecting the surrounding environment, including both its natural and cultural resources. C.A. App., Vol. I, pp. 107-16 (Final EIS).

Considering the numerous goals of the project, including that of protecting the environment, it is evident that less environmentally onerous alternatives—such as a ten-lane crossing with simplified land-side interchanges—would satisfy the agency's basic aims.[4] For example, a ten-lane crossing would eliminate structural concerns about the existing Bridge, sharply reduce the safety problems, remove the current bottleneck, and substantially deal with projected traffic levels even twenty years hence, while having far fewer adverse environmental effects. At the same time, because satisfaction of forecasts of traffic demand two decades in the future is inherently uncertain and a matter of degree, this is a paradigmatic case where,

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[4] Petitioners believe that these goals could be addressed by a wide range of alternatives that were not considered by DOT in the EIS, including a bridge or tunnel crossing with less than twelve lanes at the existing site or construction of an additional crossing miles downstream.

as the Eleventh Circuit stated, "the decision maker [could] ... conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact." *North Buckhead*, 903 F.2d at 1542. But only a NEPA analysis that takes a hard look at a broader range of alternatives can permit the decision maker to reach that conclusion.

The court of appeals, however, held that the alternatives that needed to be analyzed under NEPA could be determined solely by whether or not they satisfied what the court deemed DOT's real objective, on which it said the agency "focused specifically": "the traffic needs that will exist twenty years after the project's approval" at the current crossing site "during peak commuting hours." App. 10a-11a. In emphasizing a single functional objective of the project—rather than the underlying reasons for and diverse goals of the project—the court of appeals rejected the Seventh and Eleventh Circuits' approach, an approach the D.C. Circuit has explicitly rejected before. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (expressly disagreeing with the Seventh Circuit's view in *Van Abbema* that the reasonableness of alternatives should be judged by the "general goal" of the project); *see also* Michael E. Lackey, Jr., *Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants*, 60 GEO. WASH. L. REV. 1232, 1257, 1268 (1992) (discussing D.C. Circuit's disagreement in *Citizens Against Burlington* with Seventh Circuit).[5]

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[5] The analysis employed by the D.C. Circuit in the 1990s actually marks a retreat from its earlier approach, which was similar to that (...continued)

II. THE COURT OF APPEALS' RULING UNDERMINES NEPA BY ENDORSING A METHOD BY WHICH AGENCIES CAN AVOID MEANINGFUL COMPLIANCE WITH THE ACT.

The decisions requiring an agency to analyze alternatives that could achieve the general goal of the project, thus precluding the agency from focusing its analysis so narrowly as to exclude a range of alternatives with meaningfully different environmental impacts, are correct. Judge Arnold cogently discussed the problem with the view of NEPA expressed by the court of appeals in this case in a recent dissenting opinion:

> Is the fact ... that [an alternative excluded from the EIS] is inferior, purely as a matter of air-transportation policy, to [FAA's preferred alternative] sufficient to justify the exclusion of [the former] from detailed analysis? I think not. This is exactly the sort of thing that NEPA was designed for. The possibility that some substantive benefits of a project might not be great enough to justify its environmental costs is exactly the point of NEPA. In the end, the agency will make this decision, but it is allowed to do so, under the statute, only after a detailed explanation of alternatives. *City of Bridgeton*, __ F.3d at __, 2000 WL 355521, at *15 (R. Arnold, J., dissenting).

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of the Seventh Circuit. Indeed, the court of appeals below purported to distinguish (and questioned the "continuing vitality" of) its own precedent holding that alternatives should not be disregarded "'merely because they do not offer a complete solution to the problem.'" App. 12a-13a (quoting *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972)).

The court of appeals decision in this case provides DOT, which undertakes or approves numerous construction projects, with a roadmap for avoiding any significant NEPA analysis in virtually every case. By defining the transportation purpose of a project in narrow terms, such as enabling "x" cars per day or "y" passengers per hour to use a particular road, the agency could justify its refusal to take a hard look in the EIS at the environmental impacts of any smaller alternatives on the ground that they do not satisfy the chosen objective even though they may only barely miss the mark. In such cases, agency decision makers will never receive the information needed to weigh competing functional benefits versus environmental impacts. In effect, the court of appeals' decision has licensed DOT, and indeed any federal agency, to refuse to give detailed consideration in an EIS to any alternative that would not fully satisfy a single non-environmental goal specified by the agency. This result would be totally inconsistent with Congress's clear intention in enacting NEPA, because it would allow agencies to limit the scope of their environmental analysis by the simple expedient of adopting a narrow functional definition of the project's objective.

A commentator has observed that the D.C. Circuit "erred [in *Citizens Against Burlington*] by not following the *Van Abbema* court's approach of considering the alternatives to the proposed action in light of the general goals of the project." Lackey, *supra*, 60 GEO. WASH. L. REV. at 1268. This observation highlights the need for Supreme Court review of the D.C. Circuit's application of its approach to NEPA in this case. The correct enforcement of this vital statute should not depend upon the fortuity of the venue in which a particular action must be brought.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the conflict in the circuit courts on this fundamental issue concerning the application of NEPA.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5220

City of Alexandria, Virginia, et al.,
Appellees,

v.

Rodney E. Slater, Secretary, U.S. Department
of Transportation, et al.,
Appellants.

Appeal from the United States District Court
for the District of Columbia (98CV00251)

December 17, 1999

Before: Silberman, Williams, and Randolph, Circuit Judges.

Opinion for the Court filed by Circuit Judge Silberman.

SILBERMAN, *Circuit Judge*: Appellees challenged the Federal Highway Administration's approval of plans to replace the Woodrow Wilson Memorial Bridge. The district court held that the Administration violated the National Environmental Policy Act and the National Historic Preservation Act. We reverse.

I.

The Woodrow Wilson Memorial Bridge is a microcosm of the Washington, D.C. metropolitan area's traffic congestion problems. Built in 1961, the six-lane

structure carries the Capital Beltway over the Potomac River, connecting the City of Alexandria, Virginia, to Prince George's County, Maryland; originally intended to serve as a Washington bypass for interstate travelers, it became increasingly used by commuters as the region's population grew. As a result, traffic volume on the Bridge has increased to over 160,000 vehicles per day, more than twice the capacity the structure was designed to accommodate; congestion is particularly acute during peak hours, where the configuration of an eight-lane Beltway feeding into a six-lane bridge—in addition to steadily increasing local traffic in the surrounding communities—has produced one of the worst rush-hour "bottlenecks" in the region. These congestion problems have created harmful collateral consequences: the heavy volume on the Bridge has contributed to an accident rate nearly double that of similar facilities in the region, and has expedited the deterioration of the Bridge's structure to the point where the Bridge is projected to be structurally unsound by 2004.

Efforts to replace the Bridge began over ten years ago, when the Federal Highway Administration, in cooperation with its coordinate agencies in Maryland, Virginia, and the District of Columbia, began examining alternative approaches to solving the Bridge's capacity and structural problems. The Administration began to study the potential effects of rebuilding the Bridge on the surrounding communities early in the project's development, commissioning surveys of historic and archaeological resources in areas likely to be affected by the projects. The Commission also started the process, mandated by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1994), of considering the environmental impacts of alternative project designs. In 1991 the Administration issued a draft Environmental

Impact Statement (EIS) for public comment; this statement suggested and compared five proposals for replacing the Bridge. Each of the alternatives in the draft proposed expanding the river crossing from six to twelve lanes, and included a similar expansion of the five-mile Beltway corridor approaching the river crossing from the east and west.[1]

Reaction to the draft was less than enthusiastic; the Administration was criticized for assessing inadequately the environmental and cultural impacts of its proposal, and for failing to coordinate its work with that of interested governmental agencies and community groups. By its own admission concerned that "a region-wide consensus about the new bridge had not been reached," the Administration went back to the drawing board. In response the Administration organized a "Coordination Committee" composed of elected and administrative officials from the region to enhance community and intergovernmental cooperation. The Committee revisited the entire process of developing alternative Bridge designs, ultimately soliciting and considering over 350 proposals from interested individuals and organizations, and increased the Administration's public outreach efforts in affected communities. In the meantime, pursuant to its obligations under section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1995 & Supp.), and section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303 (1997), the Administration continued to

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[1] More specifically, the project would widen the Beltway to twelve lanes between Telegraph Road in Alexandria and Route 210 in Prince George's County.

assess the project's potential impacts on historic, archaeological, and cultural resources in the area.

In 1997, the Administration issued its Final Environmental Impact Statement (the "Final EIS"). The Final EIS gave detailed consideration to eight alternative proposals (seven "build" alternatives and a baseline "no build" alternative), comparing them on a range of criteria including vehicle capacity, cost, and extent of environmental impacts. As was the case with the draft each of the "build" alternatives scrutinized in the Final EIS had twelve lanes; each alternative also had a lane configuration that separated local and express traffic, and contained a lane dedicated for High Occupancy Vehicle usage. The critical difference among the proposed alternatives was the type of river crossing; the seven "build" alternatives included a range of tunnel and bridge designs. Although the Final EIS discussed narrower eight- and ten-lane options, it did not afford them full treatment as formal "alternatives" because the Administration concluded, on the basis of traffic projections, that narrower river crossings would fall short of meeting the Bridge's long-term traffic needs. Among the eight options the Administration designated a "Preferred Alternative" that would replace the Bridge with two parallel six-lane drawbridges (one drawbridge for eastbound and one for westbound traffic) clearing the Potomac's navigational channel by seventy feet at their highest points. The Administration also included in the Final EIS a sixty-page "Section 4(f) Evaluation" identifying and offering plans to mitigate the effects of the Preferred Alternative and all other build alternatives on public parks, wildlife refuges, and historic sites.

After a brief comment period the Administration approved the Preferred Alternative in a Record of Decision

and submitted, as is required by section 106 of the National Historic Preservation Act, a Memorandum of Agreement evidencing the Administration's cooperation with state historic preservation officers in identifying historic sites that might be impacted. The Memorandum identified and offered mitigation plans for several historic sites, but it also noted that the Administration had not yet identified properties to be used for "construction staging, dredge disposal, wetland mitigation, or other ancillary activities" during the period of the Bridge's construction.

The City of Alexandria filed an action in the district court challenging the Administration's approval of the project, and the district court permitted three Alexandria-based organizations that opposed the Administration's proposed alternative (collectively the "Alexandria Coalition" or "appellees") to intervene as plaintiffs. The City alleged that the Administration had violated a host of regulatory provisions, including the National Environmental Policy Act, section 106 of the National Historic Preservation Act, and section 4(f) of the Department of Transportation Act.[2] After both sides had filed for summary judgment the City of Alexandria settled its claim with the Administration, leaving the Alexandria Coalition as the only remaining plaintiffs.

The district court ruled in favor of the Alexandria Coalition. *See City of Alexandria v. Slater*, 46 F. Supp. 2d 35 (D.D.C.1999). The court concluded that the Administration had violated NEPA by not affording

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[2] The City also alleged that the Administration violated the Clean Air Act by failing to conduct a conformity analysis for the twelve-lane preferred alternative. The district court agreed, but the Administration does not appeal this finding.

detailed consideration to a ten-lane river crossing as a "reasonable alternative" in the Final EIS, and that the Final EIS' treatment of the temporary environmental impact of the construction phase of the project was too cursory to satisfy NEPA. Relying upon our recent decision in *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C.Cir.1999), the district court also determined that the Administration had violated section 106's requirement that an agency "take into account" the effects of a proposed project on protected historic properties by postponing the identification of the sites that were to be used for construction-related "ancillary activities." Because an agency must complete the section 106 identification process before it can satisfy section 4(f)'s requirement that an agency use "all possible planning to minimize harm" to historic sites, the court concluded that the Administration had necessarily failed to comply with section 4(f) as well. The district court remanded the project to the Administration; the Administration appealed, as it is entitled to do. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330 (1989) (when district court remand obliges agency to take further actions under an arguably incorrect legal standard an immediate appeal is appropriate).

II.

A.

The National Environmental Policy Act's mandate "is essentially procedural," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); the statute requires that agencies assess the environmental consequences of federal projects by following certain procedures during the decision-making process. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193-94 (D.C. Cir. 1991). Before

approving a project, an agency must prepare a "detailed statement ... [on] the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(i)-(iii). These general prescriptions are given sharper focus in the Council on Environmental Quality's regulations,[3] which require agencies to prepare environmental impact statements; at the "heart of the environmental impact statement" is the requirement that an agency "rigorously explore and objectively evaluate" the projected environmental impacts of all "reasonable alternatives" for completing the proposed action. 40 C.F.R. § 1502.14.

Appellees argue, and the district court agreed, that the Administration violated NEPA by failing to deem a ten-lane bridge a "reasonable alternative" in the Final EIS. They observe that a ten-lane bridge would constitute a significant improvement over the existing six-lane structure, and would reduce congestion with considerably less impact on environmental and cultural resources than each of the twelve-lane alternatives compared by the Administration. In addition to having a narrower river crossing, appellees point out that a ten-lane alternative would have a smaller construction "footprint" along the

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[3] The Council on Environmental Quality has no express regulatory authority under the National Environmental Policy Act; instead, the Council was empowered to promulgate binding regulations by President Carter's Executive Order No. 11991, 42 Fed.Reg. 26,967 (1977). Because the Administration does not challenge the Council's regulatory authority, we treat the Council's regulations as binding on the agency. *But see* Scott C. Whitney, *The Role of the President's Council on Environmental Quality in the 1990s and Beyond*, 6 J. ENVTL. L. & LIT. 81 (1991).

entire five-mile stretch of the Beltway that will be under construction, and would require smaller interchanges at each of the four points of access to the Beltway in the project corridor. The Administration responds that the ten-lane alternative favored by appellees was excluded after studies determined that it did not meet the traffic capacity needs of the project. The Administration also argues that the difference between the environmental impacts of the two projects is less than appellees suggest; a ten-lane bridge would impact only 1.6 fewer acres of parkland and 12.9 fewer acres of natural resources over the entire length of the project corridor, and would have an identical impact on cultural resources.

How are the merits of appellees' argument to be assessed? After all, the phrase "reasonable alternative," standing alone, offers no guidance to a reviewing court. Something can only be an "alternative" by reference to something else; "the term 'alternatives' is not self-defining." *Vermont Yankee*, 435 U.S. at 551. The Council on Environmental Quality, for its part, does little to clarify the baseline against which a "reasonable alternative" is to be measured; its regulations at times appear to contrast the "alternatives" to the "proposal," suggesting that the range of reasonable alternatives are to be selected by reference to the project implemented. *See* 40 C.F.R. s 1502.14. But that approach would seem to bias the process. *See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). And even if we were to understand an "alternative" to be defined by reference to the proposal actually selected, our interpretive task would hardly be easier, as "the adjective 'reasonable' is no more self-defining than the noun that it modifies." *Citizens Against Burlington*, 938 F.2d at 195.

We have resolved this difficulty by evaluating an agency's choice of "reasonable alternatives" in light of the objectives of the federal action; as then-Judge Thomas put it in *Citizens Against Burlington*, "[t]he goals of an action delimit the universe of the action's reasonable alternatives." *Id.* But that approach of course requires that we first consider whether the agency has reasonably identified and defined its objectives. The agency's choice of alternatives are, then, evaluated in light of these stated objectives; an alternative is properly excluded from consideration in an environmental impact statement only if it would be reasonable for the agency to conclude that the alternative does not "bring about the ends of the federal action." *Id.* We engage in both of these inquiries—whether an agency's objectives are reasonable, and whether a particular alternative is reasonable in light of these objectives—with considerable deference to the agency's expertise and policy-making role. *Id.* at 196.

The district court's opinion suggests that the Administration improperly defined its objectives, criticizing the Administration for narrowing its choice of alternatives "based on a set of criteria that focused primarily on transportation and safety issues." *City of Alexandria*, 46 F. Supp. 2d at 44. This description of the Administration's objectives is an accurate one; while the "Statement of Purpose and Need" in the Final EIS references several objectives (including protecting the environment), it focuses on the region's traffic needs. But it hardly follows that the Administration violated NEPA. As mentioned above, NEPA's injunction that agencies consider the environmental impacts of "all reasonable alternatives" does not substantively constrain an agency's choice of objectives; to the contrary, it is those very objectives that provide the point of reference for a determination whether an alternative is "reasonable" in the

first place. By suggesting that the Administration violated NEPA because it did not sufficiently prioritize environmental goals, the district court subtly—and impermissibly—transformed a procedural statute into a substantive one. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, (1983) ("Congress in enacting NEPA ... did not require agencies to elevate environmental concerns over other appropriate considerations.") The proper question to ask at the outset of a NEPA inquiry is not whether the Administration focused on environmental goals but rather—as we noted—whether its stated objectives were reasonable. It seems rather obvious to us that it is not unreasonable in articulating its objectives for an agency to "focus primarily on transportation and safety issues" when replacing a massively congested and structurally unsound bridge. *Cf. Corridor H*, 166 F.3d at 374 (affirming the Administration's rejection of highway alternatives that did not meet the transportation and safety needs of the region).

More in keeping with our precedent, the district court also determined that a ten-lane alternative was reasonable—and therefore should have been given greater attention—in light of these objectives. The district court arrived at this conclusion by characterizing the Administration as "articulat[ing] the problem as one of addressing the future transportation needs of the region." "Such a broad statement of purpose and need," the district court explained, "hardly provides an unequivocal basis for eliminating ten-lane alternatives from consideration." *City of Alexandria*, 46 F. Supp. 2d at 44. This might be so, had the Administration truly characterized its objectives in such general terms. But it did not. As is required by statute, *see* 23 U.S.C. § 109(b), the Administration instead focused specifically—in its Statement of Purpose and Need and elsewhere—on the traffic needs that will exist

twenty years after the project's approval, and its analyses based on 2020 traffic projections demonstrate that a ten-lane bridge would be insufficient. The Administration's studies show that appellees' preferred design (a ten-lane configuration without an HOV lane) would be able to accommodate less than half of the per-hour capacity of the Administration's preferred alternative, causing peak-hour traffic queues of significantly greater length and extended duration; accident rates would also be markedly higher on a ten-lane structure.

The district court ignored this data, instead focusing exclusively on an Administration study showing that a ten-lane bridge would be able to accommodate up to 295,000 vehicles per day, a number only slightly smaller than the projected daily traffic flow on the Bridge in 2020. *City of Alexandria*, 46 F. Supp. 2d at 44. But that study apparently assumed an even flow of traffic throughout the day (which, of course, is unrealistic). Whatever the total number of vehicles that will cross in a 24-hour period, the relevant question is how long during peak commuting hours it will take to cross the bridge. Appellees also do not seriously challenge the Administration's findings, instead protesting that these studies establish little more than the "truism ... that a ten-lane bridge would carry somewhat less traffic than a twelve-lane bridge." It is not apparent to us why this proposition has less force in the case because it is a "truism."

Appellees' more fundamental argument is that, regardless of its shortcomings in satisfying future traffic needs, we must hold a ten-lane bridge to be a reasonable alternative in light of our statement in *Natural Resources Defense Council, Inc. v. Morton* that an agency should not "disregard alternatives merely because they do not offer a complete solution to the problem." 458 F.2d 827, 836

(D.C. Cir. 1972). Appellees overread *Morton*. In that case an environmental group challenged the Secretary of the Interior's proposed sale of oil and gas leases to submerged lands in the Gulf of Mexico; the Secretary sought to sell these properties as part of a cross- agency effort, initiated by the President, to increase American energy supplies. We held that the Secretary's environmental impact statement violated NEPA because it failed to consider alternatives outside of the Department of the Interior's jurisdiction; we also noted that the agency could not exclude alternatives "supplying only part of the energy that the lease sale would yield." *Id.* at 836. This broad articulation of "reasonable alternatives" was compelled by the national scope of the problem being addressed: "When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened." *Id.* at 835.

Morton thus stands for the same proposition as *Citizens Against Burlington*: namely, that a "reasonable alternative" is defined by reference to a project's objectives. *Morton* explained that, within the context of a coordinated effort to solve a problem of national scope, a solution that lies outside of an agency's jurisdiction might be a "reasonable alternative"; so might an alternative within that agency's jurisdiction that solves only a portion of the problem, given that other agencies might be able to provide the remainder of the solution. Such a holistic definition of "reasonable alternatives" would, however, make little sense for a discrete project within the jurisdiction of one federal agency, as we recognized in *Morton* when we contrasted the Secretary's action with

that of building "a single canal or dam."[4] *Id.* Concerned with severe traffic conditions in the Capital Region, Congress has authorized the Administration to replace the Woodrow Wilson Memorial Bridge. The Administration has sole responsibility for solving this problem; were it to build a ten-lane bridge, no one else would step in and alleviate the congestion that would result.[5] In this context, it is simply a *non sequitur* to call a proposal that does not "offer a complete solution to the problem" a "reasonable alternative."

One other point merits brief discussion. In finding a ten-lane alternative reasonable, the district court noted that the Administration only conducted a Clean Air Act conformity analysis for the use of ten lanes on the Bridge. *See City of Alexandria*, 46 F. Supp. 2d at 45. If the Administration only expects ten lanes to be open, the district court reasoned, how can it fail to consider a ten-

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[4] We doubt the continuing vitality of the rather expansive view of NEPA we expressed in *Morton*, since subsequent Supreme Court cases have directly criticized us for overreading that statute's mandate. *See Baltimore Gas & Elec. Co.*, 462 U.S. at 97; *Vermont Yankee*, 435 U.S. at 554; *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). *Morton*, after all, suggested that the Secretary should have deemed as "reasonable alternatives" Congress' ability to reduce oil import quotas and the Federal Power Commission's authority to change its natural gas pricing policies. 458 F.2d at 835, 837. To be sure, *Vermont Yankee* cited with approval our statement in *Morton* stressing the limits of an agency's obligations under NEPA, 435 U.S. at 551, but we wonder whether *Morton*'s holding can be squared with *Vermont Yankee*'s injunction that "the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Id.*

[5] As the Administration determined, there are no apparent and feasible independent rail transit options that could be combined to a ten-lane bridge to satisfy transportation needs.

lane bridge as a reasonable alternative under NEPA? The answer is that the Clean Air Act and NEPA inquiries have different time horizons; while a project must show conformity with the Clean Air Act at the time it is approved, *see* 42 U.S.C. § 7506(c)(1) (1995), the consideration of reasonable alternatives under NEPA requires, as mentioned above, an assessment of traffic needs in 2020. Accordingly the Administration did not violate the National Environmental Policy Act by failing to include a ten-lane bridge proposal as a "reasonable alternative" in its Final Environmental Impact Statement.

B.

Once an agency identifies the "reasonable alternatives" to a proposed action, NEPA and Council on Environmental Quality regulations also require an agency to identify the "adverse environmental effects" of each alternative. *See* 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. § 1502.16. The district court found fault with the Administration's treatment of the temporary "construction impacts" that would arise during the period that the Bridge was being built. Again, we disagree.

The district court focused on the brevity of the "Construction Impacts" section of the Final EIS, which covers only four pages and, according to the district court, "is of such a broad and generic nature that it could apply to practically any construction project undertaken by the [Administration]." *City of Alexandria*, 46 F. Supp. 2d at 45. While the Administration's discussion might have been more thorough, we think the district court's assessment of the Administration's treatment of these issues too harsh. The Administration addresses a range of expected construction impacts, including the construction's likely effect on local traffic, air quality, area noise levels, water quality and wetlands, cultural

resources, and visual effects. The level of detail of these assessments varies; it is worth noting, in light of the district court's focus on the terseness of the Administration's analysis, that some of the shorter analyses are the most eminently reasonable. Take, for instance, the Administration's discussion of traffic impacts. The Administration acknowledges that the construction project will affect traffic flow on several Alexandria roadways, and may also cause potential delays in the delivery of emergency services. It also offers a range of mitigation strategies: six lanes of the Bridge will be kept open at all times to minimize rush-hour congestion; some access (even if circuitously routed) will be maintained to all roads and areas; there will be no disruption of marine traffic on the Potomac; the public will be notified of temporary road closings through the news media, the posting of signs, and the creation of a "project activities" hotline. Perhaps appellees would prefer the Administration to set forth in the Final EIS a comprehensive plan detailing precisely which streets will be closed, and which alternative routes will be established, but that is not mandated by NEPA. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) ("[I]t would be inconsistent with NEPA[ ] ... to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.").

We think the terseness of the Administration's discussion of construction impacts is justified for other reasons as well. The Administration typically delays the identification of "construction staging" sites—locations used to store materials and equipment during project construction—until the design stage of the project. As will be discussed *infra*, this practice is permissible under the statute and is arguably required by the Administration's governing regulations. Since the Administration did not

identify the location of these areas, it of course could not identify the accompanying environmental impacts with precision. But this does not mean that the Administration did not consider, on a more general level, what those impacts would be; the Final EIS identifies several potential staging areas, and notes that each of these sites are in "previously disturbed" areas with "minimal natural resources." The Administration's brevity is particularly understandable given the numerous regulatory constraints that will limit the extent of construction activities. As the Administration notes, Maryland and Virginia require construction contractors to limit noise levels in "noise sensitive areas adjacent to the project area" to eighty decibels—a noise level comparable to that currently produced by traffic on some stretches of the highway. Similar federal and state regulatory provisions require the mitigation of any short-term construction impacts on wetland and aquatic resources, constrain the emissions of dust from construction-related activities and equipment, and limit the Administration's selection of construction staging areas. The Final EIS' reference of these provisions is important, as it indicates the Administration's awareness of the maximum impact that the construction may cause.

We also note that agencies are enjoined by the Council on Economic Quality to develop environmental impact statements that are "no longer than absolutely necessary" and that discuss impacts "in proportion to their significance." 40 C.F.R. § 1502.2(b)-(c). The Administration points out that each of the seven "build" alternatives would have similar construction impacts, thus making a detailed discussion of each of their effects redundant. More fundamentally, while the disruption caused by the construction of a project as significant as this one is by no means trivial, it is relatively modest in both scope and duration when compared to the

environmental impact of the project as a whole. To be sure, there is a point at which an agency's analysis ventures from the "tolerably terse to the intolerably mute," *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), but we simply do not think that the Administration's analysis of construction impacts reaches that point.

III.

A.

The district court concluded that the Administration also failed to identify adequately the effect that its preferred alternative will have on historic resources in the project area, as is required under two distinct but overlapping statutes: section 106 of the National Historic Preservation Act and section 4(f) of the Department of Transportation Act. Section 106, like NEPA, is essentially a procedural statute; it requires that agencies "take into account the effect of [an] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]." 16 U.S.C. § 470f. To comply with section 106, an agency must consult with state historic preservation officers to ensure that historic properties in the project area are thoroughly identified and the effects that the project will have on them fully assessed. *See* 36 C.F.R. § 800.4-.5.[6] The usual product of this consultation process is a Memorandum of Agreement among the consulting parties signifying agreement upon how the detrimental effects will

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[6] The Council has recently promulgated regulations revising the section 106 process. 64 Fed.Reg. 27,044 (1999). Our citations are to the regulations as they existed at the time the Administration approved the project.

be "taken into account." Even where disagreement precludes the completion of a Memorandum of Agreement an agency may implement a project after receiving and considering comments from the Advisory Council on Historic Preservation. *See id.* at 800.6(c).

On the other hand, section 4(f), unlike the other statutes at issue in this case, imposes a substantive mandate on the Administration: It prohibits the agency from taking an action that "uses" a historic resource unless there is "no prudent and feasible alternative to using that land" and the agency engages in "all possible planning" to "minimize harm" to the sites.[7] 49 U.S.C. § 303(c); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Department of Transportation regulations require the Administration to "make the section 4(f) approval" at the same time that it approves its final EIS or issues its Record of Decision, 23 C.F.R. § 771.135(l); the Administration ordinarily complies with this requirement by publishing a separate "Section 4(f) Evaluation" along with its final EIS, which identifies the project's effects on historic properties in the project area and the efforts the agency has taken to mitigate those effects. In order to comply with 4(f)'s substantive requirements, it is of course necessary first to identify historic sites in the project area; accordingly, we have observed that compliance with section 4(f) is predicated upon completion of the section 106 process. *See Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 371 (1999).

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[7] In addition to historical sites, other properties—including parks, recreational areas, and wildlife preserves—are protected by section 4(f).

The central dispute between the parties is not about whether, but about when, the Administration must complete its identification of historic properties. The Administration has been "taking into account" the effect of the proposed project on historic sites since the project's inception, conducting several surveys which led to the identification of 23 National Register-listed or National Register-eligible properties, and 36 underwater or terrestrial archaeological sites in the project area. The Administration also identified and visited each National Register-listed property in Alexandria for the purpose of determining, among other things, the "visual impacts" that various alternative bridge proposals would have on each site. The result was publication of a Memorandum of Agreement and a Section 4(f) Evaluation with or prior to the Administration's approval of the project; these documents identify seven historic sites that will be affected by the project and another six that may be, and offers plans to minimize and mitigate the project's impact on these properties.

The district court did not question the overall legitimacy or thoroughness of these studies.[8] (Indeed, appellees cannot identify a single historic resource in the

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[8] Appellees point to the Administration's decision to reduce the size of the "Area of Potential Effects" in 1997, and suggest that the Administration reduced this Area in an attempt to evade section 106's obligations. The Administration offers a perfectly innocent explanation, which we have no reason to question: The Area of Potential Effects was originally drawn with a range of alternatives in mind, including taller bridge designs with far more extensive "visual effects" in Alexandria. It was then reduced to encompass only those areas affected by the preferred alternative. Notably, appellees do not point to any properties outside of the new "reduced" Area of Potential Effects that will actually be affected by the project.

project area that the Administration failed to "take into account."[9] Instead, the district court concluded that the Administration violated section 106 by deciding to postpone the identification of sites where it would conduct certain construction-related activities, including construction staging areas (the locations where contractors will store materials and mobilize construction activities), wetland mitigation areas, and dredge disposal sites. While the likely impact of these activities, which the Administration describes as "ancillary," are minimal when compared to those of the project as a whole, it is at least conceivable that they could ultimately affect section 106 properties. Acknowledging this possibility, but noting that it usually defers the identification of such properties until the "design stage" of a large highway project, the Administration included promissory language in its Memorandum of Agreement binding it to fulfill its section 106 responsibilities when selecting these sites. The district court thought that these prospective terms ran afoul of our

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[9] Amicus Sierra Club rather inventively argues that the Administration failed to treat as a section 106/4(f) property the Hunting Terrace apartment complex in Alexandria, but it is not eligible for inclusion in the National Register of Historic Places, and therefore is not a protected property under either section 106 or section 4(f). See 23 C.F.R. § 771.135(e); 36 C.F.R. § 800.2(e). Showing similar ingenuity, appellees argue that the Administration violated sections 106 and 4(f) because "the boundaries of Freedman's Cemetery have still not yet been determined." They apparently believe that since the site's precise location is unknown (and, it seems, unknowable), it is by definition impossible to know for certain the "effect" that the construction will have on the site, thus placing the Administration in violation of sections 106 and 4(f). To set forth the logic of this argument is to refute it. *Cf. Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1231-32 (9th Cir.1999) (inability of Forest Service to identify location of Indian march justified decision not to designate it a section 106 property).

recent decision in *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999), in which we held that the Administration could not postpone the entire section 106 process until after it issued its Record of Decision.

We think that district court misconstrued our holding in *Corridor H*. In that case, the Administration postponed the entire section 106 process for a major highway corridor; its Record of Decision instead adopted a "Programmatic Agreement" dividing the highway into fourteen segments, and promised that it would not begin construction of a particular segment before completing the section 106 process for that segment. We held that this Agreement impermissibly abrogated the Administration's responsibility to assess the project's impact on historic properties during the planning stages of the project. *See* 166 F.3d at 373. But that is not the case here, since the Administration has identified historic properties along the entire project corridor and documented its findings prior to approval in both a Memorandum of Agreement and a Section 4(f) Evaluation. All that has been deferred is the identification of sites that might be impacted by a small number of "ancillary activities." This is quite distinguishable from the "Programmatic Agreement" we proscribed in *Corridor H*.

The Administration did not postpone the identification of these properties "merely to avoid having to complete its 4(f) and 106 analyses," as the district court said. 46 F. Supp. 2d at 47. As the Administration points out, the precise identification of these sites requires "substantial engineering work" that is not conducted until the design stage of the project; indeed the Administration is required to conduct such "final design activities" after it completes its Final EIS. 23 C.F.R. § 771.113(a)(iii). Furthermore, then-existing Council regulations explicitly

encouraged flexible, staged planning in the section 106 process. *See* 36 C.F.R. § 800.3(b) (section 106 procedures "may be implemented ... in a flexible manner"); 36 C.F.R. § 800.3(c) (section 106 regulations should not be interpreted to "prohibit phased compliance at different stages in planning."). Appellees respond that the Administration could nonetheless "feasibly" identify these sites without doing "final design" plans for the project. But the standard of "feasibility," while relevant to whether an agency may use 4(f) properties, has no application in determining when the agency must identify them. We think that, particularly where the sites postponed are merely ancillary to the project, section 106 and the identification prerequisites of section 4(f) do not forbid the rational planning process adhered to by the Administration.

B.

We also think that the Administration satisfied section 4(f)'s substantive provisions. Appellees barely bother to argue that the Administration did not comply with section 4(f)(1)'s requirement that it consider all "prudent and feasible alternative[s]" to using protected properties. The reason for this gap in appellees' otherwise vigorous presentation is obvious enough. For while the Administration is required to give the protection of 4(f) property "paramount importance" in determining whether an alternative is "prudent," *Overton Park*, 401 U.S. at 412-13, we have squarely held that an alternative cannot be a prudent one if it does not satisfy the transportation needs of the project. *See Citizens Against Burlington*, 938 F.2d at 204. In light of this limitation, appellees can only win under section 4(f)(1) if they establish one of two propositions: They must show that a narrower Bridge satisfies the transportation needs of the project, or they

must offer a "prudent" project alternative that does not impact the 4(f) properties used by the Administration's preferred design. The former question we have already resolved in the Administration's favor, and appellees do not advance an alternative highway route that has a less significant impact on 4(f) properties.

Appellees do argue with greater enthusiasm that the Administration violated section 4(f)(2)'s requirement that the agency engage in "all possible planning" to minimize harm to 4(f) properties, but this argument is equally unpersuasive. To begin at the broadest level of generality, appellees do not question the Administration's express findings that, among the seven "prudent and feasible" alternatives compared in the Final EIS, the preferred alternative "results in the least overall impact to section 4(f) resources." *Cf. Druid Hills Civic Ass'n, Inc. v. FHWA*, 772 F.2d 700, 716 (11th Cir. 1985) (noting that "section 4(f)(2) requires a simple balancing process which totals the harm caused by each alternate route to section 4(f) areas and selects the option which does the least harm"). At the site- specific level, the Administration made several significant project modifications to avoid or minimize impacts to section 4(f) properties, including altering an interchange design to avoid impacting a schoolground and eliminating the construction of a temporary Beltway overpass to minimize the risk of harm to Freedman's Cemetery. Where the Administration could identify no feasible and prudent plan for avoiding impact to a 4(f) site, it offered plans to mitigate that impact; for instance, it proposed substantial improvements to Jones Point Park, arguably the most significant 4(f) property impacted by the project. Further recitation of the Administration's mitigation efforts is possible, but unnecessary; suffice it to say that, after a thorough review of the record, we have little difficulty concluding that the Administration

complied with its responsibilities under section 4(f) of the Department of Transportation Act.[10]

* * * *

During the course of our consideration of this case, appellees have attempted to bolster their position by pointing to the opposition of prominent legislators to the project, and by noting the hurdles to ultimate congressional approval that still lie in the Administration's path. These political impediments are irrelevant to us but they indicate where appellees should concentrate their efforts. We have been admonished by the Supreme Court with respect to the very statute that is at the heart of this case to avoid using its requirements as a vehicle to impose our own judgment. *Vermont Yankee*, 435 U.S. at 554. Our obligation is not to further our *beau ideal* of a bridge design, but merely to ensure that the procedures mandated by these statutes have been complied with. We hold that the Administration has satisfied the requirements of NEPA, the National Historic Preservation Act, and the Department of Transportation Act, and reverse.

So ordered.

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[10] Appellees correctly note that section 4(f)'s substantive requirements can only be complied with after section 4(f) properties have been identified. We remind the Administration that our holding that it could defer the identification of section 4(f) properties that might be impacted by construction staging and dredge disposal activities in no way absolves it of its responsibility to conduct a 4(f) analysis when selecting these sites during the design stage of the project.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5220

City of Alexandria, Virginia, Appellee,
v.
Rodney E. Slater, Secretary, U.S. Department of Transportation, et al., Appellants

Alexandria Historic Restoration and Preservation Commission, Coalition for a Sensible Bridge, Inc. and Historic Alexandria Foundation, Appellees.

March 7, 2000

Before: Silberman, Williams, and Randolph, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed February 1, 2000, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5220

City of Alexandria, Virginia, Appellee,

v.

Rodney E. Slater, Secretary, U.S. Department of Transportation, et al., Appellants

Alexandria Historic Restoration and Preservation Commission, Coalition for a Sensible Bridge, Inc. and Historic Alexandria Foundation, Appellees.

March 7, 2000

Before: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Henderson did not participate in this matter.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

City of Alexandria, Virginia	)	
	)	
Plaintiff,	)	
	)	
Alexandria Historic Restoration and Preservation Commission, et al.	)	
	)	Civil Action No. 98-0251 (SS)
Plaintiff-Intervenors	)	
	)	
v.	)	
	)	
Rodney E. Slater, U.S. Department of Transportation, et al.,	)	
	)	
Defendants	)	
	)	

MEMORANDUM OPINION

This matter comes before the Court on Cross-Motions for Summary Judgment.[1] The relevant undisputed facts are set forth below.

The Woodrow Wilson Bridge (the "Bridge") is a six-lane drawbridge linking interstates I-495 and I-95. It is designed to carry approximately 75,000 vehicles per day

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[1] The named Plaintiff, the City of Alexandria, is no longer a party to this action. Accordingly, reference is made to Plaintiff-Intervenors only in the body of the opinion.

across the Potomac river. It lies a few miles south east of the Nation's Capitol and just north of the historic City of Alexandria, Virginia. The Bridge was opened to traffic in 1961. Added use in recent years has caused increased traffic problems on the Bridge and at its interchanges. Travel demand across the Bridge now far exceeds the capacity for which it was designed. Projected travel in 2020 is estimated around 275,000 vehicles per day, requiring up to 18 lanes through the Bridge corridor. In part because of these projections, Congress passed the Woodrow Wilson Memorial Bridge Authority Act of 1995, providing for large-scale improvements at the river crossing site. It is the general consensus that the Woodrow Wilson Bridge needs to be replaced.

On November 25, 1997, the Federal Highway Administration ("FHWA") issued its Record of Decision ("ROD") approving a $1.6 billion highway project (the "approved project") which calls for replacing the Bridge with two parallel drawbridges, each with space for four general purpose lanes, one merge/diverge lane, and future accommodation of one High Occupancy Vehicle ("HOV") or "other type" lane.[2] The two new bridges would increase by about 260% the width of the river crossing now served by the Bridge and would rise an additional twenty feet above the Potomac River. The approved project also entails reconstructing a five mile stretch of the connecting interstate routes 495 and I-95 to accommodate twelve lanes: eight general purpose lanes, two merged/diverge lanes and two HOV lanes. In addition, the approved project authorizes substantial redesign and reconstruction of the four interchanges on either side of the bridge. The

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[2] Hereinafter, the "8-2-2" lane configuration.

drawbridges would pass through Alexandria, Virginia's Historic District thirty feet south of the Bridge's present location.

Alexandria is one of America's most historic cities. Approximately one square mile of Alexandria is listed as a National Register Historic District. This District preserves the atmosphere of an early Virginian town, and contains three individually-designated National Historic Landmarks.[3] The approved project would pass through the southernmost portion of Alexandria four blocks south of the Alexandria National Historic Landmark District.

1. NEPA Compliance

The initial step to replace the Woodrow Wilson Bridge began in 1989 when the FHWA held a Bridge improvement design competition. While nothing substantial emerged from this effort, on May 17, 1990, the FHWA published a Notice of Intent to prepare a Draft Environmental Impact Statement ("DEIS"). The Notice stated that the purpose of the DEIS was to evaluate proposals to "improve the Woodrow Wilson Bridge and the I-95 approach roadway network between Telegraph Road in Virginia, and Indian Head Highway in Maryland." 55 Fed. Reg. 20556-02 (May 17, 1990).

Pursuant to the May 17 Notice, the first DEIS was published in August 1991. Joint Appendix at pp. 003371-3757.[4] It contained detailed evaluations of six alternatives requiring construction of a new river crossing and

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[3] Gadsby's Tavern, Christ Church, and the Franklin and Armfield Slave Pen.

[4] Hereinafter, reference to the Joint Administrative Record will appear as "JA."

improved interchanges (so-called "build" alternatives), and an evaluation of one alternative requiring only repair of the existing Bridge (the "no build" alternative). All of the build alternatives presented in the 1991 DEIS were comprised of twelve lanes or more. JA003376-78. Furthermore, the 1991 DEIS twelve-lane build alternatives all called for physical separation of the local and express traffic, and complete reconstruction of certain interchanges. Despite the forseeable enormity of the construction required by the project, the 1991 DEIS included only three pages of analysis of potential construction impacts resulting from the various build alternatives.

In early 1992 the FHWA formed an independent review team ("IRT") to review and identify areas in the 1991 DEIS that might be challenged in court. JA003878. The IRT was composed of government attorneys and related professionals from the FHWA, Maryland, Virginia and the District of Columbia. JA003880. Although the IRT stated that the DEIS was "adequate," it found several serious deficiencies in the 1991 DEIS, including failure to discuss construction impacts adequately, failure to critically analyze the assumption that HOV lanes would be added to the Beltway, and failure to evaluate additional regional impacts adequately. Additionally, the IRT noted that the National Historic Preservation Act ("NHPA") Section 106 analysis had not yet been initiated. JA003879. Shortly after the IRT concluded its review the FHWA ran a traffic analysis for a ten-lane river crossing. JA003898.

In June, 1992, the FHWA formed a Coordination Committee, comprised of elected officials and senior government executives from affected jurisdictions to coordinate project development. The FHWA intended to arrive at its preferred alternative project design through a

"funneling" process. Accordingly, in the Spring of 1994 the Coordination Committee solicited suggestions for project alternatives from all interested individuals and organizations. While most of the suggestions the Committee received dealt with the river crossing portion of the project, the entire five-mile corridor was open for comment. In evaluating suggestions, the Committee applied a stepwise process of elimination. The Committee first weeded out suggestions it deemed duplicative, beyond the scope of the study, technically infeasible, or not in keeping with the project's purpose and need.

After initial screening, the FHWA combined the remaining suggestions into "unique and distinct crossing options and project area improvements." JA000068. These were then merged into a set of "end-to-end" alternatives: i.e. alternatives covering all facets of the project. The Coordination Committee reduced the number of end-to-end alternatives by applying three Measures of Effectiveness ("MOE"). The final MOE application results were presented in the January 1996 Supplemental Draft EIS ("SDEIS"). The six 1996 SDEIS build alternatives all had twelve lanes. Thus, the January 1996 SDEIS contained six "end-to-end" project alternatives, the only major design difference between them being the form (e.g. bridge or tunnel) and location of the river crossing.

2. CAA Compliance

Pursuant to the Clean Air Act, in May 1996, the Region III Administrator of the FHWA asked the Transportation Planning Board ("TPB") to determine regional air quality conformity for a Bridge replacement with twelve lanes but "opening with only 10-lanes until the conditions for multi-modal, regional travel are reached." [Ex. 75.] In July, 1996, the TPB issued a draft conformity analysis for a "new 10 lane facility with either a $1.00 or

$1.50 toll each way." [Ex. 76 at JA005185. para 130.] The draft conformity analysis found that a ten-lane bridge replacement with a $1.00 to $1.50 toll would conform to National Capital Region air quality standards.[5]

On September 27, 1996, days after the close of the comment period on the July 1996 SDEIS and nine days after the conformity assessment was approved, the Coordination Committee selected its Preferred Alternative. Then, pursuant to NEPA, the study team began preparation of the Final EIS ("FEIS"). The FEIS was released on September 2, 1997.

The FEIS explains the omission of ten-lane alternatives by stating that such configurations "cannot satisfactorily address the transportation needs of the region." FEIS JA000109-113. The FEIS reports that the ten-lane, no-HOV option was considered "in the early stages of the study ... [but] was dropped at that time ... because it was insufficient from a functional, safety and operational standpoint." JA000109. That conclusion follows solely from the reduced capacity of a ten-lane versus a twelve-lane crossing. At the same time, the FEIS notes that social, cultural and environmental impacts produced by a ten-lane alternative would be "essentially the same" as those produced by a twelve-lane alternative. JA000113. To support its conclusion, the FEIS includes a one page "Environmental Impact Matrix" purporting to break down the impacts of ten-and twelve-lane configurations with respect to fifteen environmental, social and cultural factors. JA000465. This table, in essence,

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[5] The concept underlying imposition of a toll is based on the theory that a substantial toll will "drive away" certain price conscious prospective users.

purports to demonstrate that the cumulative negative effects on cultural, natural, and social resources of a twelve-lane alternative are not substantially different from those produced by a ten-lane alternative.

It is undisputed that alternatives with fewer than twelve lanes, without HOV lanes and physical separation of local and express traffic, were not subjected to detailed NEPA analysis. FHWA has maintained that such alternatives were properly excluded from NEPA analysis since they would not meet the purpose and need of the project.

3. NHPA and DOTA Compliance

Beginning in 1991 and pursuant to Section 106 of the National Historic Preservation Act and Section 4(f) of the Department of Transportation Act ("DOTA"), the FHWA began taking into account the potential effects of the project on sites eligible for listing on the National Register of Historic Places. The FHWA conducted investigations identifying cultural resources which might be adversely affected by the project, and solicited comments from interested parties. Between 1996 and 1995, the FHWA continued conducting cultural resource investigations which included, inter alia, research at the relevant State Historic Preservation Offices, the Library of Congress, and the National Archives. In addition, the FHWA coordinated archaeological excavations, aerial photographic surveys, and other field work aimed at identifying cultural and historic resources. JA000230.

In 1995, the FHWA defined the area of potential effects ("APE") of the project, demarcating the area which might be negatively impacted by the project. In January 1996, the FHWA issued a Cultural Resources Technical Report ("CRTR"). The CRTR purported to serve as an

"integrated compilation of all previous terrestrial and underwater archaeological/historic resource surveys, investigations, and determinations of effect," according to the FHWA. JA005629. Also in 1996, the FHWA circulated two proposed Memoranda of Agreement ("MOA"). Under Section 106 implementing regulations, the MOA represents formal agreement among the consulting parties as to how adverse effects of the project will be taken into account. 36 C.F.R. § 800.5. The two proposed 1996 MOAs were not signed by the consulting parties. Subsequent to the 1996 CRTR, the FHWA performed additional cultural and technical studies. In 1997, the FHWA substantially reduced the size of the project's APE, and circulated three more proposed MOAs. *See* JA006313. Signature to the final, October 1997, MOA was made predicate to future participation in identification of protected properties and mitigation efforts. See JA002100, JA006839. The final, October 1997, MOA was signed by the City of Alexandria, the District of Columbia State Historic Preservation Officer, the Maryland State Historic Preservation Officer, the Virginia State Historic Preservation Officer, the National Park Service, and the FHWA. Several interested parties did not sign the final MOA, including the Alexandria Historical Restoration and Preservation Commission and Old Town Civic Association. The City of Alexandria, which signed the final MOA, noted in an addendum to its signature page "the City ... continues to believe that the FHWA has not adequately taken into account the effect of the [approved project] on historic resources, as required by Section 106[of the National Historic Preservation Act]." JA006841.

ANALYSIS

1. Standard of Review

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment the Court must assume the evidence of the non-movant, "and all justifiable inferences thereto", in the light most favorable to him." *Anderson* [*v.*] *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is appropriate where, as here, review is on the administrative record. *See, e.g. Lun Kwai Tsui v. Attorney General of the United States*, 445 F.Supp. 832, 835 (D.D.C.1978) ("summary judgment is appropriate after a review of the administrative record") (citing *Richards v. INS*, 554 F.2d 1173, 1177 n.28 (D.C. Cir. 1977)). A reviewing court shall look to the administrative record that was before the decision-maker at the time that the challenged action was taken. 5 U.S.C. § 706; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). In reviewing an agency action under the Administrative Procedure Act ("APA"), the agency's action will be overturned if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The Court's role is to "consider whether the decisions were based on a consideration of relevant factors and whether there was a 'clear error of judgment.'" *Corridor H Alternatives, Inc. v. Slater*, 982 F.Supp. 24, 28 (D.D.C. 1997) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

Here, there are no disputes as to the documents contained in the record. The parties only disagree as to their legal significance. Therefore, summary judgment is

appropriate as the questions presented before this Court are solely legal in nature.

II. Compliance with the Clear Air Act

Congress enacted the Clean Air Act ("CAA") in order "to protect and enhance the Nation's air quality, to initiate and accelerate a national program of research and development designed to control air pollution, to provide technical and financial assistance to the States in the execution of pollution control programs, and to encourage the development of regional pollution control programs." 42 U.S.C. § 7401(b) (1988). Pursuant to the CAA, to protect the public health, the EPA established National Ambient Air Quality Standards ("NAAQS") which reflect the maximum concentration levels of particular pollutants (criteria pollutants) allowable. *See* 42 U.S.C. § 7409 (1991). Responsibility for achieving and maintaining the NAAQS falls on the states, which are required to submit state implementation plans ("SIPs") to the EPA specifying the manner in which they will achieve and maintain the NAAQS for various criteria pollutants. *See* 42 U.S.C. § 7407. The EPA and the states have designated different regions according to the level of criteria pollutants in each area. *See id.* A region which has not attained the NAAQS for a certain criteria pollutant is designated a "nonattainment" area. The National Capital area where the approved project is located has been designated a "nonattainment" area for Ozone.

In 1990 Congress amended the CAA in an effort to spur progress toward attainment of the NAAQS. A key component of the 1990 CAA amendments was the addition of a requirement that all federal agencies and instrumentalities undertaking activities in a nonattainment area ensure that their project will conform to the relevant SIP. This is known as the "conformity requirement". In

order to conform, the federally approved project must not cause or contribute to new violations, increase the frequency or severity of existing violations, or delay attainment of the NAAQS. *See* 42 U.S.C. § 7506(c)(1)(B). This requirement is repeated in the EPA regulations pertaining to federally assisted or approved transportation projects. *See* 40 C.F.R. 93.101 et seq. (requiring a conformity analysis for all transportation projects prior to agency approval, funding or implementation).

In May, 1996, the FHWA conducted a conformity analysis for a ten-lane river- crossing with tolls pursuant to the Bridge project. In 1997, the FHWA issued its ROD, approving a twelve-lane river crossing. The Plaintiff-intervenors argue the FHWA must perform a conformity analysis for a twelve-lane river crossing with no tolls, and that the ten-lane, with tolls conformity analysis is insufficient under the CAA.

Defendants state they do not need to perform a conformity analysis for the approved project because it is not significantly different from the ten-lane project that was found to conform. Specifically, they contend that since initially only ten lanes will be opened, the design scope of the approved project as initially operated does not differ from the ten-lane design assumed for the purposes of the conformity analysis. They admit, however, that when the river crossing becomes twelve lane operational as anticipated, they will have to perform a new conformity analysis.[6]

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[6] Defendants put forth the same argument with respect to the issue of tolls. At this time, they state, the provision of tolls is an uncertainty. The initial conformity analysis assumed tolls, they explain, in order to assuage a Congressional requirement of a sure funding source for the project. At this time, however, the (...continued)

Neither the plain language of the CAA, nor the applicable regulations, provide the agency any such leeway. The statute and regulations state a conformity analysis must be completed prior to the approval, adoption, or implementation of a project. *See* 42 U.S.C. § 7506; 40 C.F.R. § 93.102. The EPA regulations define a project *in toto*, not, as only that part of a project that is constructed and used initially. *See* 40 C.F.R. § 93.101. The logical extent of defendant's argument, if adopted, would be to allow an agency to define a project differently depending on what particular purpose the agency has in mind at the time. For example, for NEPA purposes, the agency has defined the project as a twelve lane project; Yet, for CAA purposes, the approved project is only ten lanes in size. Such inconsistency in agency reasoning is unacceptable.

Plaintiff-intervenors further claim that the FHWA must perform another conformity analysis because the size of the interchanges has changed. Again, the FHWA disagrees. Defendants argue that consideration of the size of interchanges is immaterial for conformity analysis purposes. They note the regulations cite only to the number and location of the interchanges, not the size. This argument ignores the plain language of the regulation which states that design scope "includes" such things as the "number and location of interchanges ... *etc*". *See* 40 C.F.R. § 93.101 (emphasis added). This language does not limit solely to a consideration of the location and number of interchanges. The regulation contemplates otherwise. In this instance, the approved project consists of expanded

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provision of tolls on the bridge is uncertain, as the states of both Maryland and Virginia oppose tolls. If the approved project does not include tolls, the Defendants maintain, a new conformity analysis will be done.

interchanges necessary to accommodate the larger carrying capacity of a twelve-lane bridge. Just as the number of lanes may have an effect on air quality, due to the increase in emissions caused by more vehicles, so may the size of interchanges. Defendants must consider this factor in analyzing the project's impact on regional air quality before approval of the preferred alternative in the ROD.[7]

III. Failure to Comply with NEPA's Reasonable Alternatives Requirement

Plaintiff-intervenors allege Defendants violated the National Environmental Protection Act ("NEPA") by failing to analyze all reasonable alternatives to their preferred action when preparing the FEIS, and by failing to take the required "hard look" at the environmental and other impacts of the preferred action.

NEPA states that any federal agency undertaking a "major federal action[]" likely to "significantly affect the human environment" must prepare an Environmental Impact Statement. The EIS must provide a "detailed statement" of the environmental impacts of the action, possible alternatives, and measures to mitigate adverse effects of the proposed action. *See* 42 U.S.C. § 4332(2)(C). While NEPA does not mandate any particular result, it requires the agency to follow particular procedures in its decision-making process. The purpose of these procedures is to ensure the agency has before it the

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[7] The EPA informed the FHWA in June, 1997 that it had "concerns about the air quality analysis of the project in the FEIS". Specifically, EPA stated "it is not clear that the proposed project will conform to the Clean Air Act implementation goals". June 11, 1997 Letter to Mr. David C. Lawton, Director Office of Planning and Program Development from EPA.

best possible information in order to make an "intelligent, optimally beneficial decision" and to ensure the public is fully apprized of any environmental risks that may be associated with the preferred action. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C.Cir.1971).

A key component of the EIS is the analysis of "reasonable alternatives." 40 C.F.R. § 1502.14(a). Agencies must "rigorously explore and objectively evaluate all reasonable alternatives" prior to selecting a specific project. *Sierra Club. v. Watkins*, 808 F.Supp. 852 (D.D.C.1991). Alternatives that present a feasible solution to the project's stated purpose and need of the project are reasonable. *See Citizens Against Burlington, Inc., v. Busey*, 938 F.2d 190, 193-94 (D.C. Cir. 1991). While an agency may decline to give rigorous consideration to proposals that fall far short of the project's purpose and need, an agency may not eliminate an otherwise reasonable alternative solely because it presents only a partial solution to the stated purpose and need for the project. *See NRDC v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972). Indeed this Circuit has held that it is unreasonable "to disregard alternatives merely because they do not offer a complete solution to the problem." *Id.* at 836. However, agencies need not consider every conceiveable alternative. In determining the appropriate set of reasonable alternatives to be given "rigorous" consideration in the EIS, agencies must be guided by a "rule of reason." *Busey* at 194-195.

A second requirement of NEPA is that agencies take a "hard look" at the environmental impacts of their action. Agencies must consider the environmental effects

of their actions "to the fullest extent possible" in order to satisfy this hard look requirement. *See* 42 U.S.C. § 4332.[8] The D.C. Circuit has interpreted this statutory provision to require that "environmental issues be considered at every important stage in the decision making process." *Calvert Cliffs'*, 449 F.2d at 1118. In addition, the FHWA's own NEPA policy requires the agency give "balanced consideration" to transportational and safety factors, environmental impacts, and national, State, and local environmental goals in selecting its preferred alternative. *See* 23 C.F.R. § 771.105(b).

A. *Standard of Review*

A court, in reviewing an alleged NEPA violation, is limited to determining whether the agency complied with the statute's procedural requirements. *Busey* at 195. So long as an agency has considered all reasonable alternatives and taken the requisite "hard look" at environmental factors, its substantive decision will not be overturned by a court unless it is "arbitrary, capricious, or an abuse of discretion." *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989). Notwithstanding the judicial deference given to an agency's substantive choice, the D.C. Circuit has required "strict compliance" with NEPA's "inflexible" procedural requirements. *See* 449 F.2d at 1109.

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[8] The CEQ regulations implementing NEPA mirror this statutory requirement. 40 C.F.R. §§ 1502.1 and 1502.2(b). (An agency's EIS must provide a "'full and fair" discussion of the significant environmental impacts" of the project.)

B. *Failure to Analyze all Reasonable Alternatives*

Plaintiff-intervenors contend the FHWA did not consider "all reasonable alternatives" prior to selecting its preferred action. They allege the FHWA predetermined the project's lane configuration and unreasonably failed to consider the diminished environmental impact of a ten-lane alternative with smaller interchanges.

Defendants claim the agency did in fact consider an appropriate range of reasonable alternatives, including ten- and eight-lane bridge-crossings.[9] According to Defendants, the FHWA gave ample consideration to a ten-lane alternative, and took a hard look at the environmental impacts of such a project.[10] Indeed, at several places in the FEIS the FHWA notes that the ten-lane project was rejected after such consideration because it failed to meet the purposes and needs of the project. Specifically, the FEIS states that any bridge-crossing with fewer than twelve lanes and no HOV capacity could not alleviate projected future traffic congestion. Furthermore, the FEIS notes that the environmental, socio-economic, and cultural benefits of a ten-lane crossing are minimal. To support this position Defendants cite to a one-page "Environmental Impact Matrix" ("Matrix") in the FEIS which compares

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[9] In 1995 the Coordination Committee dropped the eight-lane alternative because it was projected that it would not alleviate traffic congestion on and around the bridge, nor could it accommodate HOV lanes on the river crossing.

[10] The FHWA cites to three pages in the FEIS that discusses the various costs and benefits of a ten-lane project as opposed to a twelve lane. In addition, they cite to a May 1996 retreat at which time the Coordination Committee discussed a ten lane alternative, weighed the comparative environmental and other impacts, and decided that environmental benefits of the ten lane were minimal.

various ten and twelve lane alternatives vis-a-vis fifteen environmental, socio-economic, and cultural factors. *See* JA000465.

This Court finds that the FEIS does not support FHWA's claim that they gave the ten-lane alternative adequate consideration. The Environmental Impact Matrix does not begin to give a complete indication of the environmental, social, and cultural costs and benefits of a ten-lane versus a twelve-lane crossing. For example, the Matrix shows that both ten- and twelve-lane alternatives would affect five public parks. Yet no indication is given as to the nature or extent of any such impact on the five parks. The analysis of air impact in the Matrix demonstrates this point even more fully. The Matrix indicates no adverse impact[.]

Additional deliberation is required before the agency can conclude that its twelve lane proposal will have zero impact on air quality, when it has yet to undertake any conformity analysis as required by the CAA. Indeed, the EPA, in reviewing the draft FEIS, indicated that the FEIS's analysis of "air impact" was inadequate. *See* June 11, 1997 Letter to Mr. David C. Lawton, Director Office of Planning and Program Development from EPA.

The consideration that the FHWA gave to a ten-lane alternative prior to the publication of the FEIS demonstrates the agency's insufficient analysis as well. In soliciting proposals for its 1990 concept competition, the agency specified that all plans be a minimum of fourteen lanes and have HOV capacity. Thus, in its first Draft EIS, the agency did not consider a ten-lane alternative. Then, between 1992 and 1996 when the Coordination Committee was reviewing proposals, the narrowing of alternatives was based on a set of criteria that focused primarily on

transportation and safety issues[.] JA000109. This narrowing was done without the benefit of any detailed analysis of the environmental and cultural costs and benefits of a ten-lane or smaller bridge-crossing.

Defendant's state that they did not need to give detailed consideration to a ten-lane alternative because it did not meet the agency's stated purpose and need for the project. The FEIS in its "Project Need" statement articulates the problem as one of addressing the future transportation needs of the region within the context of the Constrained Long-Range Plan for the National Capitol Region. Such a broad statement of purpose and need hardly provides an unequivocal basis for eliminating ten-lane alternatives from consideration without rigorous comparison of the environmental, socio-economic, and cultural benefits. Moreover, the limited analysis the FHWA did on a ten-lane alternative demonstrates that it could possibly provide a partial solution to the problem. The FHWA's own traffic analysis of a ten-lane alternative demonstrates that it can handle up to 295,000 vehicles per day. This is close to total satisfaction of the estimated maximum 300,000 vehicles per day which will cross the river in 2020. To eliminate all ten-lane alternatives from "rigorous" consideration simply because they fall short of the total future estimated demand by 2 percent does not stand up to the rule of reason which must guide the agency in making its determination.

Given that a ten-lane alternative presents a feasible alternative, the FHWA should have assessed closely the benefits associated with it. The three pages discussing the environmental and other benefits of a ten-lane project, and the Matrix comparing them, falls short of providing the

kind of detailed analysis necessary to support an agency's decision under NEPA.[11]

There is a logical inconsistency in the agency's reasoning. First, the FHWA attempts to support its decision under NEPA by stating that a ten-lane bridge without HOV lanes could not satisfy the "statement of purpose and need". In contrast, for purposes of the CAA, the FHWA characterizes the project as a ten-lane river crossing The FHWA's effort to re-characterize the fundamental nature of the approved project so as to satisfy both NEPA and CAA cannot be reconciled. The river crossing is either ten lanes or it is twelve. It cannot be both.

C. *Failure to Adequately Assess Construction Impacts*

The Plaintiff-intervenors further claim the FHWA failed to take the required "hard look" at the immediate and long-term impacts associated with the construction of the approved project. Specifically, they point to insufficient identification and assessment of the construction impacts in the FEIS.

NEPA requires the agency make available to public officials and citizens the environmental impacts of an action prior to selecting a preferred course of action. *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664

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[11] Obviously, reconsideration of the lane configuration will require further review of the various interchange designs that accompany the river-crossing portion of the project. In light of this Opinion it is assumed the agency will consider all reasonable interchange alternatives as part of its reconsideration of final end-to-end alternatives. Therefore, this Court need not consider in detail Plaintiff-intervenors claim that defendants failed to consider reasonable alternatives to its "preferred" interchange designs.

(7th Cir. 1997). In order to satisfy this requirement, the FEIS must identify and analyze the effects the project is projected to have on environmental factors. *See NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988). The 1997 FEIS prepared by the FHWA in anticipation of their ROD failed to do this. Defendants cite to approximately four pages in the FEIS which discuss the construction impacts likely to be associated with the project as evidence of their compliance. However, the discussion of construction impacts is of such a broad and generic nature that it could apply to practically any construction project undertaken by the FHWA. For example, in identifying and quantifying the amount of air emissions, the FEIS flatly states "the construction phase has the potential of temporarily impacting ambient air quality due to emissions from construction equipment and dust from earthwork and the utilization of unpaved roads." The FEIS neither attempts to quantify such air emissions, nor describes how such impact could affect the human and non-human environment. Discussions of noise,[12] visual,[13] and other impacts in this section are similarly vague and non-informative. Such terse summaries of the likely effects do not come close to providing the public with the kind of information necessary to weigh the environmental costs and benefits of the project. The Environmental Protection Agency noted as much in its assessment of the Draft FEIS. The EPA stated that the FEIS should present a "worse case

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[12] The FEIS predicts that "an increase in project noise levels would occur during the construction of the proposed project" and that a noise study "will be performed during the design phase of the study to analyze the potential noise impacts of specific construction impacts." JA000470.

[13] The FEIS states only that "views may be temporarily affected."

quantitative estimate of potential acreage impacts to wetlands and aquatic resources", expand on the development of a mitigation plan, and identify the impacts on the federally-protected bald eagle and osprey. *See* June 11, 1997 Letter to Mr. David C. Lawton, Director Office of Planning and Program Development from EPA. The agency did not accept the EPA's recommendation in finalizing the FEIS.

[IV]. The FHWA Failed to Complete its Identification of Protected Properties under the NHPA

Federally funded highway projects must comply with both Section 106 of the National Historic Preservation Act, 16 U.S.C. §§ 470f, 470h-2(f), and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303.

To satisfy Section 4(f), the FHWA must first identify all protected properties that may be affected by a potential project. *See Corridor H. Alternatives, Inc. v. Slater*, 982 F.Supp. 24, 31 (D.D.C.1997). A property is protected under the DOTA if it is "a park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site)." 49 U.S.C. § 303(c). The FHWA must then determine if the project will "use" any protected properties. Finally, if the project calls for "use" of protected properties, the Secretary of the FHWA must do "all possible planning" to minimize harm to those properties. 49 U.S.C. § 303(c)(2); *See Druid Hills Civic Ass'n, Inc. v. Federal Highway Admin.*, 833 F.2d 1545, 1547-48 (11th Cir.1987).

Section 106 of the National Historic Preservation Act provides that any agency having jurisdiction over a federally-assisted project "shall, prior to the approval of expenditure of any Federal funds on the undertaking ... take into account the effect of the undertaking on [any district, site, building, structure, or object that is included or eligible for inclusion in the National Register]." 16 U.S.C. § 470f. Under regulations implementing Section 106, the FHWA is required to identify historic properties within the area of potential effects of the project, and must perform an analysis of the likely impacts on those properties. *See* 36 C.F.R. Part 800 (1998); *Colorado Indian Tribes v. Marsh*, 605 F.Supp. 1425, 1435-38 (C.D.Cal.1985).

It is clear that compliance with Section 4(f) is partially predicated upon completion of a Section 106 analysis of impacts on historic properties. The regulations implementing Section 106 and Section 4(f) define historic properties in substantially the same way. Sections 4(f) regulations identify historic properties as "all properties on or eligible for the National Register of Historic Places." 23 C.F.R. § 771.135(e). Regulations implementing Section 106 define historic properties as all properties listed on or eligible for listing on the National Register of Historic Places. 36 C.F.R. § 800.2(e) (1998). Therefore, to identify pursuant to Section 4(f) all places of historic significance that will be used by a project, the agency must have satisfied the Section 106 identification requirement. *See Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 372 (D.C.Cir.1999). As Judge Hogan recently stated, because "Section 4(f) duties with respect to historic sites are tied to a review of historic resources under Section 106 of the NHPA, it follows that an agency must complete its Section 106 determinations before it can begin compliance with Section 4(f)." *Corridor H*, 982 F.Supp. at 32.

Likewise, it follows that an agency cannot reasonably be expected to do "all possible planning" to minimize harm to protected properties as required by DOTA Section 4(f) without first having completed a detailed and comprehensive list of protected historic resources potentially affected by the project.

Plaintiff-intervenors contend that FHWA violated both Section 106 of the NHPA and Section 4(f) of the DOTA. First, Plaintiff-intervenors claim that the FHWA did not take sufficient steps to identify historic resources which would be used by the project under Section 106. Second, Plaintiff- intervenors maintain that the FHWA did not do "all possible planning" to minimize harm as statutorily required by Section 4(f) of the DOTA.

In support of their argument that the FHWA did not conduct a sufficient NHPA and DOTA historic resource identification process, plaintiff-intervenors point to statements made in the MOA. The MOA, for example, says that "the Project may have an effect on additional properties [not identified in the MOA] that are eligible for inclusion in the National Register, as the result of activities related to implementation of the Project, including, but not limited to construction staging, dredge disposal, wetland mitigation, or other ancillary activities ...". JA 002089. Plaintiff-intervenors contend that the locations and effects of such activities are reasonably forseeable, and therefore could be designated prior to adoption of the approved project in the ROD. The MOA also envisions the preparation of an Historic Resources Identification and Evaluation Report (the "Report"), "identify[ing] and evaluat[ing] the defining historical characteristics of the Alexandria Historic District within the APE." JA002090-91. The plaintiff-intervenors point out that the MOA is largely promissory in nature, providing little in the way of

concrete identification of protected resources and mitigation plans. By not identifying all protected resources prior to approval, plaintiff- intervenors state that the FHWA violated the DOTA and the NHPA[.]

Defendants explain that since the project design has not been completed as to certain activities, no identification need be done at this point. The Defendants in essence propose putting off decision on the location and extent of construction staging and dredge disposal, as well as certain undefined "ancillary activities." This necessarily puts off identification of protected resources which might be affected by design of those elements. *See* MOA at JA002089. The FHWA argues that such activities may be legitimately dealt with by execution of the MOA. The FHWA further claims that the Report does not represent an effort to attenuate the Section 106 identification process, but to "continue the Section 106 consultation process" both as to identified properties and those not yet identified. Def.[s'] Br. at 66.

The Section 4(f) process must be completed before the ROD is issued. *See* 1999 WL 54795 at 6 [166 F.3d 368, 373] (citing the "explicit requirement" that "[the FHWA] complete the section 4(f) process before [it] issues the ROD"). Here, the identification process was not completed prior to issuance of the ROD. Identification of historic properties possibly affected by dredge disposal sites and construction staging is expressly postponed. An "Historic Resources Identification and Evaluation Report" is exactly what the NHPA and DOTA call for; namely, identification of historic sites and evaluation of the adverse impacts on them. Such a report must be prepared as part of the Section 106 process prior to the issuance of the ROD.

That the ROD approves a project design postponing full compliance with the NHPA and the DOTA is not adequate. An agency is not allowed to approve a less-than-fully designed project in the ROD merely to avoid having to complete its 4(f) and 106 analyses. Such a holding would vitiate the purposes behind Sections 4(f) and 106. Where aspects of the project can be feasibly determined prior to the ROD, those aspects should be factored into the Section 4(f) and 106 analyses. Here, the MOA merely reflects agreement by the signatory parties to postpone identifying "properties" and mitigation procedures.

Because this Court concludes that the FHWA has failed to complete the required identification of protected affected properties under Section 4(f) of the DOTA and Section 106 of the NHPA, it need not address the Plaintiff-intervenors' argument that the FHWA failed to do "all possible planning" as required by the DOTA Section 4(f). This will have to be done in the agency's reconsideration of its project.

As Defendants have not complied with their obligations under the CAA, NEPA, NHPA and the DOTA, this Court has no choice but to hold that the agency abused its discretion in issuing its ROD in 1997 and remand this matter for further agency action. Accordingly, construction on the new bridge can not commence until the agency has fulfilled its responsibilities under these statutes.

The court is reluctant to order this action. These statutes have as their purpose the protection of various aspects of the public interest. Despite their intended purpose, they often cause regulatory gridlock which results in necessary projects being interminably delayed. It is clear an expanded bridge crossing linking the North and South at the Nation's Capital is sorely needed. While a

return to the simpler days of the past might better satisfy the concerns of the public interest statutes involved here, progress must nevertheless occur. Simply put, an expanded bridge over the Potomac River is necessary if this Nation's Capital and its surrounding neighborhoods are not going to suffer paralysis.

The City of Alexandria along with the other municipal areas that would be affected by the proposed construction have now all signed off on the project.[14]

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[14] Recently, the City of Alexandria, an original plaintiff in this litigation, entered into a settlement with the Defendants. The agreement calls for:

1. Construction of direct access to Eisenhower Avenue from 495.
2. Study of the impact of eliminating a Church Street exit ramp from the project, and the implementation of design measures to mitigate adverse impact on residential areas in the event the exit ramp is not eliminated.
3. A commitment to harmonize the construction of an "urban deck" with the redevelopment of Jones Point Park and portions of the George Washington Parkway south.
4. A maximum width of the project in specific areas and the absence of permanent physical structures in others.
5. The retention of certain project features that provide access to connecting high-ways and interchanges, such as Route 1 and I-195.
6. A study of the feasibility of a new river crossing south of the Woodrow Wilson Bridge.

This appears to be a positive step in bringing this important and worthwhile project to fruition. It would be hoped that at some point the other plaintiffs would show similar flexibility in resolving the particular issues of concern to them. Sometimes citizens groups with well intended objectives get so caught up in their own zeal that they lose sight of overall societal needs and the public interest as a whole suffers. Without an appropriate and (...continued)

While administrative reconsideration of the project is all that this Court can order, the Project to be put on a real time basis might require direct intervention by the Congress, which after balancing all the public interest aspects could "by pass" the regulatory gridlock that has developed.[15]

An appropriate order granting Plaintiff-intervenors' motion for summary judgment and denying that of the Defendants accompanies this Memorandum Opinion.

April 13, 1999

/s/ Stanley Sporkin
Stanley Sporkin
United States District Court

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measured balance of all of society's needs, the requirements of a nation to tend to the needs of all of its citizens cannot be achieved.

[15] This court is somewhat puzzled by the proposed design of the new bridge which calls for it to be a "draw bridge." It is estimated that the bridge would be required to be opened some 200 times a year. With a projected use by some 300,000 vehicles a day, traffic bottlenecks caused by opening and closing the bridge could well be intolerable. As this nation is about to enter the 21st Century, it seems incongruous to be adopting a technology that would be better understood by our grandparents of a century ago. Certainly at this late date, a suspension bridge design would not require any new engineering feat and would seem to better meet the needs to be served by the new Potomac River crossing. Since the project needs to be "rethought" it is hoped that this issue would be included in the "rethinking" process.

APPENDIX E

National Environmental Policy Act, 42 U.S.C. § 4332(2):

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such

statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes ....

Council on Environmental Quality regulations, 40 C.F.R. § 1502.14 ("Alternatives including the proposed action"):

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement

and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.